UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

PELLEGRINO FOOD PRODUCTS, INC., Plaintiff, v. RHEON U.S.A., Defendant, v. PELLEGRINO FOOD PRODUCTS COMPANY, INC. a/k/a PELLEGRINO FOOD PRODUCTS, INC., Counterclaimant Defendant, and CALIFORNIA FIRST LEASING CORPORATION, Counterclaim Defendant.	Case No.: 1:05-CV-00189

MEMORANDUM OF LAW OF COUNTERCLAIM DEFENDANT CALIFORNIA FIRST LEASING CORPORATION IN SUPPORT OF ITS MOTION FOR CHANGE OF VENUE PURSUANT TO 28 U.S.C. § 1404(a)

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I. PRELIMINARY STATEMENT

Counterclaim Defendant California First Leasing Corporation ("CalFirst") moves for a change of venue of this recently filed action from this Court to the United States District Court for the Central District of California (Southern Division) (hereinafter referred to as the "Central District"). This Motion is filed pursuant to 28 U.S.C. § 1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Both the Defendant and the Counterclaim Defendant in this case have their principal places of business in California. The primary issues raised by both the Complaint and the Counterclaim revolve around communications and contracts (and alleged contracts) involving parties in California. There is no question that the Central District is a district in which this case might have been brought, and little doubt that transferring this matter to the Central District would provide a more convenient forum for the preponderance of the witnesses, and would better serve justice.

In brief, this action arises from Plaintiff and Counterclaim Defendant Pellegrino Food Products, Inc.'s ("Pellegrino's") acquisition, possession and use of three KN400 Cornucopia encrusting machines (the "Machines") manufactured by Defendant and Counterclaim Plaintiff Rheon U.S.A. ("Rheon"). After entering into a written contract with Rheon for the purchase and sale of the Machines, Pellegrino sought lease financing for the purchase through CalFirst. (Complaint at ¶ 8) Pellegrino, aware that no financing terms had been reached, took possession of the Machines from Rheon in January 2005 and thereafter used them to satisfy customer orders. CalFirst and Pellegrino failed to agree upon terms for the proposed lease of the Machines. In May 2005, Pellegrino withdrew its request for financing from CalFirst. Pellegrino

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has refused to pay for the goods delivered by Rheon, claiming that the Agreement with Rheon was contingent on financing and that the Machines did not perform as promised. Rheon admits that it had a contract with Pellegrino, and alleges that the contract with Pellegrino was not contingent on financing, but nonetheless seeks payment from CalFirst because a CalFirst sales representative provided Rheon with a copy of Pellegrino's financing proposal and requested that Rheon go ahead and ship the goods.

These facts reveal that the majority of the issues in the Complaint and Counterclaim will turn upon the written and oral communications between and among Pellegrino, Rheon and CalFirst. The first and second counts of the Complaint (for declaratory judgment and breach of contract) turn on whether the purchase agreement between Rheon and Pellegrino was contingent upon Pellegrino's obtaining financing – a question that will necessarily turn on communications between employees of a company headquartered in California (Rheon) and Pellegrino. (*See* Rheon's Answer at ¶ 6 and Counterclaim at ¶ 27) . Each of the claims in Rheon's counterclaim against CalFirst are based on the alleged "directive to ship" received by a Rheon employee in California from the CalFirst sales representative in California.

Since both Rheon and CalFirst are headquartered in Irvine, California (within the Central District), and since Rheon and CalFirst witnesses are located in Irvine, the Central District is the more convenient forum for the majority of witnesses.

More importantly, CalFirst's key witnesses are not readily available for proceedings in Pennsylvania. Rah-miel Mitchell, the sales representative who allegedly asked Rheon to ship the Machines to Pellegrino – has a medical condition that will render it a physical hardship to travel to Erie, Pennsylvania for proceedings in connection with this matter. Michael Curtis, the sales manager involved in the Pellegrino transaction, is no longer employed by CalFirst and thus is beyond the subpoena power of this Court. Mr. Curtis communicated with individuals at Pellegrino and at Rheon regarding the status of the proposed lease transaction, and supervised the activities of the sales representative upon whose alleged request Rheon shipped the Machines. Mr. Curtis has communicated to CalFirst that he would not willingly travel to this Court for any proceedings in this matter.

Finally, the interests of justice call for the transfer of this matter to the Central District. Rheon contends, among other things, that it is the third-party beneficiary to a Lease Agreement between CalFirst and Pellegrino (despite the fact that both CalFirst and Pellegrino deny the existence of such an Agreement). If Rheon prevails on this theory, then the proposed Lease Agreement provides for the application of California law to any disputes arising therefrom and venue for alternative dispute resolution in Orange County, California (*i.e.*, within the Central District). Thus, judicial economy would be served by transferring this matter to California, since adjudication of the contract issue in Rheon's favor would necessitate the application of California law and a dispute resolution procedure under California law. On the other hand, if it is determined that no Lease Agreement exists between CalFirst and Pellegrino, then it would be grossly unfair to require CalFirst, as a third-party to a dispute primarily between Pellegrino and Rheon, to litigate in Pennsylvania.

Accordingly, the instant Motion for a change of venue should be granted.

II. FACTS AND PROCEDURAL HISTORY

The following facts are set forth in Plaintiff's Complaint ("Complaint") and in Rheon's "Answer, Affirmative Defenses and Counterclaim."[1] Certain facts are evidenced by affidavits and exhibits filed in support of this Motion.

In January 2005, Rheon, a company headquartered in California (*see* Counterclaim, ¶ 1), entered into a written agreement (the "Agreement") with Pellegrino for Pellegrino's purchase of the Machines from Rheon for $171,000. (Exh. "A" to Counterclaim) The Agreement was executed by Thomas Pellegrino, the President of Pellegrino, and by an authorized representative of Rheon. (*Id.*) Pellegrino made a deposit of $3,000. (*Id.*) The existence of this Agreement is undisputed. It is likewise undisputed that the product covered by the Agreement – the Machines – was needed immediately because of an important order from a customer of Pellegrino. (Counterclaim, ¶ 27)

Whether the Agreement between Rheon and Pellegrino was contingent upon financing is hotly disputed. Rheon alleges that "Pellegrino specifically represented that it did not even need to obtain financing from a third party, but intended to do so because of the rate to be received," and that Pellegrino never advised Rheon that its purchase of the machines was contingent upon Pellegrino's obtaining financing. (Answer, ¶ 6) Rather, the "precise financing method was a non-essential term that governed only the timing of delivery of the machines." (Affirmative Defenses, ¶ 16)

It is alleged and undisputed that Pellegrino sought Lease financing through CalFirst, a California company. (Complaint at ¶ 8) On or about January 14, 2005, CalFirst prepared and forwarded to Pellegrino a proposal for a lease transaction with certain proposed terms (the "Proposal," *see* Affidavit of Rah-miel Mitchell, "Mitchell Aff.," at ¶ 3 & Exh. "A").[2] The Proposal was neither a promise nor an Agreement to provide financing, and in fact expressly and in bold type so stated. The Proposal states prominently that it is an "OFFER ONLY" and that this "offer is subject to the review and acceptance of Lessor's Finance Committee." The Proposal also states on its face that "guarantors" would be "[a]s required by Lessor's Finance Committee." It further provides that the transaction would be documented on CalFirst's standard lease documentation. *(Id.)* These documents and the communications related to them all involve persons located in California.

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[1] Rheon filed a single pleading entitled "Answer, Affirmative Defenses and Counterclaim Pursuant to Federal Rule of Civil Procedure 13." Throughout this Motion, CalFirst separately refers to Rheon's "Answer," "Affirmative Defenses" and "Counterclaim," for ease of finding the references, even though they are all in the same document.

On January 18, 2005, Pellegrino signed the Proposal and forwarded the same to Rah-miel Mitchell ("Mitchell"), the sales representative at CalFirst working on this transaction. (Mitchell Aff., ¶ 3 & Exh. "A" thereto)

The next day, Pellegrino executed a proposed Lease Agreement and proposed Lease Schedule pertaining to the Machines (collectively, the "Proposed Lease," *see* Mitchell Aff., ¶ 4 & Exh. "B" thereto). Unless and until executed by CalFirst, the Proposed Lease constituted a firm offer by Pellegrino. (*Id.*, front page of Lease Agreement, directly above signature blocks)

Beginning on January 19, 2005, the parties had a series of communications, both oral and written, which are critical to the claims and defenses in this case. All of these communications went to or from California.

On January 19, 2005, Thomas Pellegrino had a conference call with Mitchell and Michael Curtis ("Curtis"), Mitchell's supervising sales manager. Mr. Pellegrino requested that financing be expedited, as he needed the Machines to complete an order. Curtis explained that the transaction still needed to be reviewed and approved by CalFirst's Finance Committee. Pellegrino asked CalFirst to advise Rheon of the status of Pellegrino's proposed financing with CalFirst. After this telephone call, Curtis instructed Mitchell to contact Rheon and to inform the vendor that CalFirst had received a signed proposal and was expecting a deposit check from Pellegrino. (*See*, generally, Mitchell Aff., ¶ 5)

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[2] The Proposal is also purportedly attached to the Counterclaim as Exhibit "B"; however, the copy attached to the Counterclaim (or at least the copy of the Counterclaim served on CalFirst) is incomplete.

Mitchell subsequently called Clare Douglas ("Douglas") at Rheon on January 19, 2005 regarding the status of financing and Pellegrino's need for the Machines. The communications between and among these two individuals in Irvine, California apparently form the basis of Rheon's counterclaims against CalFirst. Rheon contends it relied upon a fax from Mitchell requesting that Rheon "go ahead and start shipping" the Machines. (*see* Exh. "C" to Counterclaim; Mitchell Aff., ¶ 5) Rheon acknowledges, however, that Pellegrino had agreed to purchase and to pay for the Rheon Machines, regardless of whether or not it succeeded in obtaining financing from CalFirst. (*See* Answer at ¶ 6 and Counterclaim at ¶ 27).

What is undisputed is that, despite its own standard requirement of a purchase order and the absence of a purchase order in this case, Rheon shipped the Machines to Pellegrino.

From late January through early March 2005, Curtis and Jim Motley ("Motley"), a credit analyst at CalFirst, worked to obtain necessary financial information from Pellegrino to determine whether to approve the financing. (*See* concurrently filed Affidavit of James H. Motley, "Motley Aff.," at ¶ 3) CalFirst determined that, based on the financial information provided by Pellegrino, the transaction could not be approved at the lease rate proposed and without a personal guaranty. (Motley Aff., ¶ 3) On March 8, 2005, Motley advised Douglas at

Rheon that the lease was not approved yet and that no payment could be made until it was approved. (Motley Aff., ¶ 4)

In March 2005, Thomas Pellegrino advised CalFirst that Pellegrino would not provide any personal guaranties. On March 23, 2005, Curtis forwarded a check to Pellegrino refunding its deposit. (Motley Aff., ¶ 5)

Thereafter, on March 30, 2005, Motley received a call from Rheon seeking payment for the Machines. Motley advised Rheon that CalFirst was not financing the transaction. (Motley Aff., ¶ 6)

Curtis also had multiple conversations with Rheon employees, at least two of whom were in Irvine, regarding the facts that CalFirst had not approved any transaction with Pellegrino, did not order the Machines from Rheon, and had no obligation to pay Rheon. (Motley Aff., ¶ 6; Mitchell Aff., ¶ 6)

By letter dated April 13, 2005 to Thomas Pellegrino, Curtis confirmed, among other things, that CalFirst did not accept Pellegrino's offer for lease financing on the Machines, and that CalFirst did not place an order for the Machines and had no obligation to Rheon. (*see* Motley Aff., ¶ 7 & Exh. "D"; Counterclaim, ¶ 66 & Exh. "H" thereto)

By correspondence dated April 29, 2005 to Curtis at CalFirst, an employee in the collections department at Rheon in California demanded payment for the Machines. (*See* Motley Aff., ¶ 7 & Exh. "E"; Exh. "K" to Counterclaim)

By certified letter dated May 2, 2005 to Curtis at CalFirst, Thomas Pellegrino formally withdrew any offer for lease financing. (*see* Motley Aff., ¶ 7 & Exh. "F"; Counterclaim, ¶ 79 & Exh. "I" thereto)

On June 17, 2005, Pellegrino filed the Complaint in this matter against Rheon. Among other things, Pellegrino alleges that any purchase of the Machines was contingent upon Pellegrino's obtaining financing, and that, since it did not obtain financing, it should have no obligation to pay for the Machines. In addition, Pellegrino alleges that the Machines did not perform as represented by Rheon and that Pellegrino suffered damages as a result.

On or about September 7, 2005, Rheon answered the Complaint and filed a Counterclaim against Pellegrino and CalFirst.

III. LEGAL ARGUMENT

A. Legal Standards For a Motion to Change Venue.

Pursuant to 28 U.S.C. §1391(a), venue in a diversity of citizenship action may be brought in (1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the acts or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, but only if there is no district in which the action may otherwise be brought. However, pursuant to 28 U.S.C. §1404(a), even when venue is proper under §1391(a), a Court may transfer venue for the convenience of the parties and witnesses, or in the interest of justice, to any other district where the action might have been brought.

Thus, the first step in a court's analysis of a motion to transfer venue under §1404(a) is to determine whether venue would be proper in the district to which transfer has been proposed. *Jumara v. State Farm Ins. Co.*, 55 F. 3 873, 879 (3d Cir. 1995). If this prong of the analysis is satisfied, the court must next determine whether a transfer would be appropriate by examining a series of private and public factors, including: the plaintiff's choice of venue; the defendant's preference; where the claim arose; the relative physical and financial condition of the parties; the extent to which witnesses may be unavailable for trial in one of the fora; the extent to which records or other documentary evidence could not be produced in one of the fora; the enforceability of any judgment; practical considerations that could make the trial easy, expeditious or inexpensive; the relative administrative difficulty into fora resulting from court congestion; the local interest in deciding local controversies at home; the public policies of the fora; and the familiarity of the trial judge with the applicable state law in diversity cases. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); *Jumara v. State Farm Ins. Co.*, 55 F. 3 873, 879 (3d Cir. 1995); *Pro Spice, Inc. v. Omni Trade Group, Inc.*, 173 F. Supp. 2d 336, 339 (E.D. Pa. 2001).

The party seeking a transfer of venue bears the burden of proving that transfer is proper, and the district court has broad discretion in deciding whether to transfer the action. *Saint-Gobain Calmar, Inc. v. National Products Corp.*, 230 F. Supp. 655 (E.D. Pa. 2002). A party seeking a discretionary transfer of venue is not required to show truly compelling circumstances for a change, but rather that, all relevant things considered, the case would be better off transferred to another district. *Connors v. R&S Parts & Services, Inc.*, 248 F. Supp. 2d 394 (E.D. Pa. 2003). In most instances, the convenience of party and nonparty witnesses is the most important factor in determining whether to grant a motion to transfer venue to another federal district court. *Arrow Electronics, Inc. v. Ducommun, Inc.*, 724 F. Supp. 264 (S.D.N.Y. 1989). The convenience test for determining whether to grant a motion to transfer to a different district is a comparative analysis between the relative conveniences and burdens of the plaintiff's choice of forum and the forum requested by the moving party; the moving party need not show inconvenience on any absolute judgmental scale. *Umbriac v. American Snacks, Inc.*, 388 F. Supp. 265 (E.D. Pa. 1975).

Applying these standards to the Motion presently before the Court, it is clear that this action should be transferred from this District to the Central District.

B. Venue is Proper in the Central District of California Under 28 U.S.C. §1391(a).

Venue is proper in the Central District for two reasons. First, pursuant to 28 U.S.C. §1391(a)(1), venue in a diversity of citizenship action may lie in a judicial district where any defendant resides, if all defendants reside in the same state. Here, Rheon, the only defendant in Pellegrino's Complaint, has its principal place of business in Irvine, California, within the Southern Division of the Central District of California. CalFirst, the Counterclaim Defendant in Rheon's Counterclaim, likewise has its principal place of business in Irvine, California.

Second, pursuant to 18 U.S.C. § 1391(a)(2), venue is proper in a judicial district where a substantial part of the act or omissions giving rise to the claim occurred. In determining whether this standard has been met, a court considers the location of those events or omissions that gave rise to the claims at issue. *Pro Spice, Inc. v. Omni Trade Group, Inc.*, 173 F. Supp. 2d 336, 339 (E.D. Pa. 2001) (*citing*, *Cottman Transmission Sys., Inc. v. Martino*, 36 F. 3d 291, 294 (3d Cir. 1994)).

In this case, the alleged events and omissions supporting both Pellegrino's claims against Rheon and Rheon's claims against CalFirst turn in large part upon communications made in – or directed to parties located in – Irvine, California.

Since venue in this action clearly would be proper in the Central District of California under 28 U.S.C. § 1391(a), this Court must now determine whether a transfer would be appropriate under 28 U.S.C. § 1404(a) by examining the private and public factors set forth by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

C. Rheon's Claims Against CalFirst Involve Few Contacts with Pellegrino's Chosen Forum.

While a plaintiff's choice of venue is ordinarily accorded significant weight, the plaintiff's choice of venue is entitled to little weight where there are few contacts between the chosen forum and the persons or events involved in the suit, and may be outweighed by other factors, such as the convenience of key witnesses. *Lomanno v. Black*, 285 F. Supp. 2d 637 (E.D. Pa. 2003); *Citibank, N.A. v. Affinity Processing Corp.*, 248 F. Supp. 2d 172 (E.D.NY 2003). In a case involving multiple claims, "venue must be proper for each claim in a case with multiple claims." *Phila. Musical Soc'y, Local 77 v. Am. Fed'n of Musicians of the United States and Canada,* 812 F. Supp. 509, 517 (E.D. Pa.1992). Thus, this Court should examine each of the claims at issue in this case – both in the Complaint and in the Counterclaim – to determine the appropriate venue.

Here, the Machines at issue were apparently shipped out of San Pedro, California (presumably originating from Rheon's facility in Irvine) (*see* Exh. "A" to Counterclaim). While Pellegrino's breach of warranty claim against Rheon may turn to some extent on evidence currently residing in Warren, Pennsylvania (*i.e.*, the functionality of the Machines shipped to Pellegrino's facilities), that claim also turns on representations made by Rheon. While CalFirst has no present knowledge regarding the location of Rheon's witnesses and documents, they are presumably located at least in part at Rheon's principal place of business in Irvine, California. . Pellegrino's declaratory judgment and breach of contract claims against Rheon likewise turn upon such alleged representations by Rheon, as well as on the written contract with Rheon.

Rheon's various claims against Pellegrino similarly turn upon the communications between Rheon and Pellegrino.

Even if the claims between Pellegrino and Rheon involve to some extent from communications outside of California, however, Rheon's claims against CalFirst clearly revolve around communications that took place solely between Rheon employees and CalFirst employees located in Irvine. The purported request by Mitchell to ship the Machines originated at CalFirst's Irvine headquarters and was directed to a Rheon employee at the Rheon Irvine headquarters. The Rheon invoice that forms the basis of its "Account Stated" claim was issued in Irvine and delivered to CalFirst in Irvine. (Counterclaim, Exh. "D") To the extent that communications with Pellegrino are relevant to Rheon's claims against CalFirst, such communications involved only one Pellegrino witness – Thomas Pellegrino. By contrast, at least four witnesses in Irvine – two CalFirst-affiliated and two Rheon-affiliated – would be expected to testify regarding the communications in question.[3]

In summary, from the standpoint of the location of events and persons involved, the Central District is an appropriate venue for all of the claims in this case, and it is the only appropriate venue with respect to Rheon's claims against CalFirst.

D. The Convenience of the Witnesses – Including the Medical Condition of One Key Witness and the Unavailability of the Other – Militates Strongly in Favor of Transferring Venue to the Central District of California.

The convenience of the witnesses provides compelling reasons for a transfer to the Central District. Aside from the general proposition that the preponderance of the witnesses – *i.e.*, employees of Rheon and CalFirst – are located within the Central District, there are specific

[3] Furthermore, all witnesses regarding CalFirst's credit decision are located in Irvine as well.

hardships that would result from having this matter proceed in the Western District of Pennsylvania.

Rah-miel Mitchell, a key witness with respect to Rheon's claims against CalFirst, has a medical condition that would render it a physical hardship for him to travel to Pennsylvania. Due to a curvature of his spine from scoliosis, Mitchell finds it painful and difficult to sit for long periods of time. His physician has advised him against flights of more than 5 hours of flight time at once, as Mitchell needs to frequently move and stretch his back. Travel from Irvine, California to Erie, Pennsylvania would require anywhere from 6 to 8 ½ hours of total flight time (depending on the itinerary). The trip would be painful for Mitchell, as airplane seats do not support his back properly and spaces in airplanes are too cramped to allow him adequate room to move and stretch. (Mitchell Aff., ¶ 7 & Exh. "C")

Michael Curtis, the manager involved in the proposed transaction with Pellegrino and who spoke extensively with both Thomas Pellegrino and employees of Rheon, is no longer employed by CalFirst. (*See* concurrently filed Affidavit of Barbara H. Bumblis, ¶ 4) He is therefore beyond the subpoena power of this Court, and CalFirst has been advised that he will not willingly travel to Pennsylvania to participate in proceedings in this matter. (*Id.* at ¶ 5)

Many courts have recognized that the unavailability of compulsory process for key witnesses is an important consideration in the analysis of a motion for change of venue.[4] In *Bonnell v. General Motors Corp.*, 524 F. Supp. 275 (E.D. Pa.1981), an employment action was transferred from the Eastern District of Pennsylvania to the Middle District of Pennsylvania, where (among other reasons) a majority of the employer's witnesses would have to be subpoenaed through the Middle District in order to compel their attendance and depositions, and where many of the relevant documents were located in the Middle District. *See also Long v. Quality Computers and Applications, Inc.*, 860 F. Supp. 191, (M.D. Pa.1994) (no transfer where majority of witnesses would not be subject to compulsory process in proposed forum); *B.J. McAdams, Inc. v. Boggs*, 426 F. Supp. 1091 (E.D. Pa.1977) (no transfer where compulsory process necessary to secure the live testimony of certain of plaintiff's witnesses would not be available in the proposed forum).

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[4] *See, e.g. Glickenhaus v. Lytton Financial Corp.*, 205 F. Supp. 102 (D.C. Del.1962); *Axe-Houghton Fund A, Inc. v. Atlantic Research Corp.*, 227 F. Supp. 521 (D.C. N.Y.1964); *Brown v. Blidberg Rothchild Co.*, 222 F. Supp. 18 (D.C. Del.1963); *Hess v. Gray*, 85 F.R.D. 15 (N.D. Ill.1979); *Fontana v. E.A.R., a Div. Of Cabot Corp., Inc.*, 849 F.Supp. 212 (S.D. N.Y.1994); *Capitol Cabinet Corp. v. Interior Dynamics, Ltd.*, 541 F. Supp. 588 (S.D. N.Y.1982).

The witness inconvenience factor clearly weighs in favor of transfer. It will not only be more costly to transport CalFirst and Rheon witnesses to Pennsylvania, but proceeding in Pennsylvania would work genuine hardships for CalFirst and/or its witnesses. Travel to Pennsylvania would be a physical hardship for Rah-miel Mitchell at CalFirst. Without the availability of compulsory process, CalFirst may be deprived of the testimony (or at least the live testimony) of Michael Curtis, an important witness to communications with both Rheon and Pellegrino. For these reasons, this matter should be transferred to the Central District.

E. The Proposed Lease Agreement Alleged by Rheon Contains a Provision That Calls for Application of California Law and Alternative Dispute Resolution Within the Central District of California.

Sections 11 and 12 of the Proposed Lease provide as follows:

11. DISPUTE RESOLUTION: THE PARTIES AGREE THAT ALL DISPUTES, WHETHER BASED IN TORT OR CONTRACT, RELATING TO OR ARISING OUT OF THIS LEASE (COLLECTIVELY, "LEASE DISPUTES") WILL BE SUBMITTED TO THE ORANGE COUNTY, CALIFORNIA OFFICE OF ENDISPUTE, INC., DBA J-A-M-S/ENDISPUTE ("JAMS") FOR A TRIAL OF ALL ISSUES OF LAW AND FACT CONDUCTED BY A RETIRED JUDGE OR JUSTICE FROM THE PANEL OF JAMS, APPOINTED PURSUANT TO A GENERAL REFERENCE UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 638(a) (OR ANY AMENDMENT, ADDITION OR SUCCESSOR

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> **SECTION THERETO) UNLESS LESSOR OR ITS ASSIGNEE SELECTS AN ALTERNATIVE FORUM. ... LESSEE AGREES TO SUBMIT TO THE PERSONAL JURISDICTION OF THE CALIFORNIA SUPERIOR COURT FOR ALL LEASE DISPUTES. LESSEE KNOWINGLY AND VOLUNTARILY WAIVES ITS RIGHTS TO A JURY TRIAL IN ANY ACTION ARISING OUT OF OR RELATING TO THIS LEASE. ...**
>
> **12. MISCELLANEOUS: ... THIS LEASE SHALL BE CONSTRUED IN ACCORDANCE WITH AND SHALL BE GOVERNED BY THE LAWS OF THE STATE OF CALIFORNIA (EXCLUSIVE OF PRINCIPLES OF CONFLICT OF LAWS). ...**

(Mitchell Aff., Exh. "B"; emphasis added). Accordingly, the very Lease that Rheon claims controls has both a California forum selection clause and a California choice of law clause.

Both Pellegrino and CalFirst deny that the parties entered into any Lease Agreement. Rheon, however, contends that CalFirst waived the contingencies in the financing proposal, resulting in a contract to which Rheon is a third-party beneficiary. Pellegrino's offer is embodied by the Proposed Lease, including the two provisions cited above. Thus, if Rheon succeeds in establishing that a Lease contract exists, then the terms of the Proposed Lease would apply to the resolution of this dispute. Rheon, by arguing that CalFirst entered the Lease, has essentially consented to litigation in California. Application of Sections 11 and 12 of the Proposed Lease would require the application of California law and the ordering of a judicial reference in California. *See Johnson v. Pennsylvania National Insurance Companies*, 527 Pa. 504 (1991) (third-party beneficiary to insurance contract is bound by dispute resolution provision in the contract).

For this reason as well, the interests of justice would be served by a transfer to the Central District. Pellegrino offered to submit to dispute resolution procedures pursuant to California law and within the Central District. In the (albeit unlikely) event that CalFirst and Pellegrino are deemed to have entered into the Proposed Lease, then it would serve judicial economy to have this matter already venued in the Central District, where the judges will presumably have greater familiarity with California law and the procedures thereunder.

If, as CalFirst contends, the parties did not enter into the Proposed Lease, then it would be grossly unfair to force CalFirst to litigate in Pennsylvania over a dispute primarily between Pellegrino and Rheon.

For these reasons as well, the instant Motion should be granted.

F. Public Factors Do Not Favor Venue in this Court.

The Supreme Court in *Gulf Oil Corp. v. Gilbert*, *supra*, identified public factors pertinent to a motion to change venue to include the relative administrative difficulty resulting from court congestion, the enforceability of judgments, the local interest in deciding local controversies at home, the public policies of the two jurisdictions, and the familiarity of the trial judge with the applicable state law in diversity cases.

None of these factors favor venue in the Western District of Pennsylvania. The controversy is local to both Erie, Pennsylvania and Irvine, California. There is no evidence that the Central District is not equipped to handle this matter. Depending on the identity of the prevailing party, a judgment in either state could have the same enforceability issues. CalFirst contends that California law should be applied (at least to the contract issues), as the majority of the communications at issue occurred in California, and as the claims against it relate to a proposed Lease Agreement containing a choice of law provision for California law. Pellegrino submitted a firm offer to CalFirst agreeing to the application of California law. In the event that Rheon prevails on its argument that CalFirst somehow entered the financing lease (which CalFirst denies), then the alternative dispute resolution, choice of forum, and choice of law provisions in the Proposed Lease would apply. As noted above, judicial economy would be best served by having this matter proceed in the Central District, given the potential that alternative dispute resolution under California law could be required.

IV. CONCLUSION

Counterclaim Defendant California First Leasing Corporation has met its burden of proving that a balancing of the pertinent factors weighs in favor of transfer of this action to the Central District of California (Southern Division). Thus, for the reasons set forth herein, CalFirst respectfully requests that this Honorable Court enter an Order granting the instant Motion to transfer venue to the United States District Court for the Central District of California (Southern Division).

Respectfully submitted,

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Dated: October 17, 2005